SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1223

JOSEPH L. BRIZARD,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
ARGUMENT: RULE 1:16-1 OF THE NEW JERSEY COURT RULES REQUIRES THE SUPPRESSION OF THE EVIDENCE OBTAINED BY UNAUTHORIZED INTERVIEWING OF JURORS AND OPERATES TO BAR PETITIONER FROM USING THIS EVIDENCE	3
A. Introduction	3
B. Rule 1:16-1 Should Be Construed to Prohibit Petitioner From Using the Evidence Obtained in the Unauthorized Interview of the Jurors Even Though He Was Not Directly Involved in the Interview	4
C. The Conspiracy Between the Defendants Continued During the Time When the Jurors Were Improperly Interviewed. Hence, Petitioner Should Be Barred From Using the Information Obtained From These Interviews	7
CONCLUSION	8

CASES CITED

Bryson v. United States, 238 F.2d 657 (9 Cir, 1956), reh. den. 243 F.2d 837 (1957), cert. den. 335 U.S. 817, 78 S.Ct. 20, 2 L.Ed. 2d 34 (1957)	6
Castaldi v. United States, 251 F.Supp. 681 (E.D. Mo. 1966)	6

CASES CITED (Continued)

Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. 2d 93 (1957) 7

Ingram v. United States, 360 U.S. 672, 679 n.10, 79 S.Ct. 1314, 1319, 3 L.Ed. 2d 1503 (1959) . . . 7

Krulewitch v. United States, 236 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949) 7

Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953) 7

Rakes v. United States, 169 F.2d 739 (4 Cir. 1940), cert. den. 355 U.S. 826, 93 L.Ed. 280, 69 S.Ct. 51 (1948) 6

State v. Brizard, et als, 117 N.J. Super. 315 (App. Div. 1971), certif. den. 60 N.J. 138, 139 (1972), cert. den. 407 U.S. 92 (1972) 1

State v. La Fera, 42 N.J. 97 (1967) 4

State v. Yormark, et al, 120 N.J. Super. 177, 182 (Law Div. 1972) 2

United States v. Colasurdo, 453 F.2d 535, 593 (2 Cir. 1971) 7

United States v. Driscoll, 276 F.Supp. 333 (S.D. N.Y. 1967) 6

United States v. Miller, 284 F. Supp. 220 (D.Conn. 1968) 6

United States v. Provenzano, 240 F. Supp. 393, 412-413 (D.C. N.J. 1964); aff'd 334 F.2d 678 (3 Cir. 1964), cert. den. 379 U.S. 947, 13 L.Ed. 2d 544, 85 S.Ct. 440 (1964) 6

NEW JERSEY COURT RULE CITED

Rule 1:16-1 2-6

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STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to review judgment entered in the Appellate Division of the Superior Court of New Jersey on June 19, 1973, which affirmed the denial of a motion for a new trial made by the Law Division of the Superior Court (The Law Division Opinion is reported at 120 *N.J. Super* 177. The Appellate Division decision is unreported). On November 12, 1973, the Supreme Court of New Jersey denied certification.

Petitioner and three others were found guilty by a jury of conspiracy to obtain money by false pretenses on January 8, 1971. On November 30, 1971, an appeal to the Appellate Division of the Superior Court resulted in an affirmance of the conviction, 117 *N.J. Super* 315 (App.Div.1971). On December 7, 1971, all defendants except petitioner filed petitions for certification to the New Jersey Supreme Court. These petitions were denied on February 1, 1972, 60 *N.J.* 138, 139 (1972). A stay of sentence was granted pending application to the United States Supreme Court. *Certiorari* was denied on March 15, 1973, 407 *U.S.* 92 (1972).

On March 17, 1972, a motion for a new trial was made on the

ground of newly discovered evidence by co-defendants Perwin and Mulvaney. Testimoney was taken and the motion denied. The motion record discloses that defendant did not join therein and his counsel did not participate in any aspect of this hearing. However, petitioner filed an appeal before the Appellate Division of the Superior Court of New Jersey on the basis that "the opinion apparently included all defendants" (DB Appendix A, p.29).

The motion for a new trial arose out of the following set of facts. During trial, George Wilson, one of the jurors reported to the Court that one Doctor Brown approached his wife and spoke favorable about co-defendant Mulvaney. The trial judge instructed this juror not to discuss this incident with anyone. Subsequently, the juror received a phone call from Doctor Brown, but did not speak to the doctor. He again reported this occurrence to the judge, who again instructed the juror not to discuss this incident with other jurors. Approximately one year later Ronald Porambo, a reporter employed by the Educational Broadcasting Corporation, interviewed nine of the jurors who deliberated at petitoner's trial. These interviews revealed that members of the jury might have been aware during deliberations of the embracery attempt made on behalf of co-defendant Mulvaney.

At the hearing on the motion, extensive testimoney was taken which focused on Porambo's motivation and participation in the matter. Judge Johnson evaluated the content and credibility of Porambo's contention that his involvement in the matter was strictly confined to a journalistic assignment and found it unworthy of belief. To the contrary, the court made an explicit finding of fact that Porambo acted at the direction of co-defendant Yormark and that Yormark embarked on this mission in order to uncover legal grounds to set aside the verdict.

While not specifically deciding on the participation of defendant's counsel, the court instructed that they were knowledgeable and experienced attorneys who "knew that what Porambo was up to was something they could not be associated with and so they simply closed their eyes in the hope that it would go away". *State v. Yormark, et al*, 120 *N.J. Super* 177, 182 (Law Div. 1972). The court then proceeded to hold that Porambo's actions in conducting unauthorized interviews of jurors contravened New Jersey Court Rule *R.*1:16-1 and that the only appropriate remedy to vindicate the policy and spirit of the rule was "to suppress the use of that which was used improperly".

ARGUMENT

RULE 1:16-1 OF THE NEW JERSEY COURT RULES REQUIRES THE SUPPRESSION OF THE EVIDENCE OBTAINED BY UNAUTHORIZED INTERVIEWING OF JURORS AND OPERATES TO BAR PETITIONER FROM USING THIS EVIDENCE.

A. Introduction

At the motion for a new trial on the basis of newly discovered evidence, Judge Johnson found that defendant Yormark had supplied Porambo with a direction concerning the interviewing of the jurors. The judge found this to be a violation of *R.*1:16-1 of the *New Jersey Court Rules,* 1969, and that while the other co-defendants may not have been privy to the entering of said plot by Porambo, they should not be allowed to benefit from his "nefarious" acts. The judge further found that the conspiracy entered into by the defendants did not terminate with their apprehension and that the violation of *R.*1:16-1 could be viewed as a further act in their conspiracy. Hence, the judge concluded that the evidence uncovered by Porambo must be suppressed.

> *R.*1:16-1 of the *New Jersey Court Rules,* 1969, provides:
> Except by leave of Court granted upon good cause being shown, no attorney or party shall himself or through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to the verdict or deliberations of the jury in any action.

Petitioner does not challenge the validity of this Rule. Rather, petitioner argues that this Rule should not be applied to bar him from challenging the validity of the jury's verdict. Specifically, petitioner argues that he did not participate in the unauthorized interviews of the jurors and, hence, should not be prevented from using the information obtained during these interviews. Petitioner further argues that the conspiracy between defendants terminated with his apprehension and thus, he did not conspire to violate *R.*1:16-1.

However, it is the State's position that (1) *R.*1:16-1 dictates that petitioner cannot benefit from evidence which was wrongfully obtained from the jurors even though he may not have

known about the uncovering of this information; and (2) that the conspiracy between the defendants continued during the time when the jurors were improperly interviewed. If this court accepts either of these two positions, petitioner should not be allowed to use the evidence discovered by Porambo to impeach the verdict.

B. Rule 1:16-1 Should Be Construed to Prohibit Petitioner From Using the Evidence Obtained In the Unauthorized Interview of The Jurors Even Though He Was Not Directly Involved In the Interviews.

*R.*1:16-1 prohibits a defendant, his attorney or any of his agents from questioning jurors with respect to their deliberations in reaching a verdict. This Rule was designed to protect the sanctity of jury deliberations against unwarranted and unsupervised intrusions by disappointed litigants. In *State v. LaFera*, 42 *N.J.* 97 (1967), Chief Justice Weintraub of the New Jersey Supreme Court explained the justification for this rule as follows:

> A jury deliberates in secrecy to encourage each juror to state his thoughts, good and bad, so that they may be talked out. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world". *Clark v. United States*, 289 *U.S.*1, 13, 53 *S. Ct.*465, 77 *L. Ed.*993, 999 (1932)...
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> ***
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> For the juror's individual protection, the law raises a privilege against disclosure of his communication during deliberations, a privilege which will yield only to some greater public need. 8 *Wigmore, Evidence* (McNaughton rev. 1961), 2346, p.678; *Clark v. United States, supra* (289 U.S.1,53 S.Ct.465, 77 L.Ed. 993). Moreover the public too has a stake in the promise of secrecy to insure free debate in cases to come. In these circumstances it is appropriate to protect all jurors against efforts of others to browse among their thoughts in search of something to invalidate their verdict. This *R.R.*1:25A (presently R.1:16-1) seeks to do.
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> ***

It may appear odd to recognize a ground for the invalidation of a verdict while denying a litigant a chance to find out whether such an event perchance did occur. The fate of a defendant is thus made to depend upon sheer luck, that the wrongful event somehow comes to light. The weight of the criticism is appreciated, but when contending values clash in their demands, a balance struck is not shown to be a poor one because in some unknowable cases there may be an injustice. Overall the instances of invalidating misbehavior are exceedingly few. And even within the limited group, a new trial may be a windfall for the defendant, since if the misconduct is capable of tainting the verdict, the verdict will be set aside without inquiry into the actual impact of that misconduct upon the result. *State v. Kociolek*, 20 *N.J.*92, 100 (1955); *State v. Levitt, supra* (36 N.J.at p.271). *Thus there is but a small factor of possible hurt. Against this must be weighed the substantial interest of the public and of defendants as a group, in the full and free debate in the jury room. We think the approach of our rule is correct.* (Emphasis supplied)

In light of the policy behind *R.*1:16-1, it would be inappropriate to allow a defendant to use information concerning the jury's deliberation which was obtained by a co-defendant. Such a practice could lead to a situation where a defendant would question jurors about their unfavorable verdict for the benefit of his co-defendant. While the defendant who investigated the jurors' motives would not be able to personally benefit from this information, he might be encouraged to pursue such an investigation to help his fellow defendant to gain a new trial. Hence, to avoid any possible harassment of the jury after the verdict, co-defendants should not be allowed to benefit from information concerning the verdict which was illegally obtained by fellow defendants.

It should be further noted that a defendant who did not tamper with the jury would not be prejudiced by his inability to make use of the illegally obtained evidence. Such a defendant would remain in a position no different from that which he occupied before the evidence was improperly obtained. Any contrary con-

clusion would instantly dilute the impact and force of *R.*1:16-1 in any case with multiple defendants and gravely jeopardize the sanctity of jury deliberations.

Several federal cases support the notion that petitioner should not benefit from the improperly obtained evidence even though he did not participate in gathering this evidence. For example, in *Bryson v. United States,* 238*F.2d* 657 (9th Cir. 1956), reh. denied 243 *F.2d* 837 (1957), *cert.*denied, 335 *U.S.*817, 78 *S.Ct.*20, 2 *L.Ed.2d* 34 (1957), a newspaper reporter communicated with jurors in violation of a court order and reported that at least two of them expressed uncertainty as to the meaning of a term referred to in the court's instruction. Defendant requested that he be allowed to interrogate the jury. However, the court held that in order to preserve the sanctity of the jury system and to protect the jurors against harassment, defendant should not be allowed to probe into the jury's verdict.

United States v. Driscoll, 276 *F.Supp.*333 (S.D.N.Y.1967), further supports the State's position. In *Driscoll,* defendant was convicted on three counts of an indictment charging him with wilfull failure to file his federal income tax return. An investigator employed by the law firm of which defendant was a member, sought to question the jurors concerning the reason for their verdict. Defendant did not know of these activities. Nonetheless, the court enjoined the defendant as well as his attorneys from interviewing the jurors.

The implication of these federal cases is clear. While a defendant may not be privy to an investigation concerning the jury's deliberations in an unfavorable verdict, he should not be allowed to benefit from such improper investigations.

Several other federal courts have condemned the practice of interviewing jurors with regard to their deliberations in the jury room. For example, see *Rakes v. United States,* 169 *F.2d* 739 (4th Cir. 1940), *cert.* denied 355 *U.S.*826, 93 *L.Ed.*280, 69 *S.Ct.*51 (1948); *United States v. Miller,* 284 *F.Supp.*220 (D.Conn.1968); *Castaldi v. United States,* 251*F.Supp.*681 (E.D.Mo. 1966) and *United States v. Provenzano,* 240 *F.Supp.*393, 412-413 (D.C.N.J.1964); aff'd 334 *F.2d* 678 (3rd Cir. 1964), *cert.*denied, 379 *U.S.* 947, 13 *L.Ed.2d* 544, 85 *S.Ct.*440 (1964).

C. The Conspiracy Between The Defendants Continued During The Time When The Jurors Were Improperly Interviewed. Hence, Petitioner Should Be Barred From Using The Information Obtained From These Interviews.

Petitioner has argued that one of the defects in the court's rationale is that it rests on a theory of implied conspiracy, which expands a defendant's vicarious liability, a practice condemned in *Krulewitch v. United States,* 236 *U.S.*440, 69 *S.Ct.* 716, 93 *L.Ed.*790 (1949).

Krulewtich and its progeny *Lutwak v. United States,* 344 *U.S.* 604, 73 *S.Ct.*481, 97 *L.Ed.*593 (1953) and *Grunewald v. United States,* 353 *U.S.*391, 77 *S.Ct.*963, 1 *L.Ed.2d* 93 (1957) were concerned with problems of alleged continuing or subsidiary conspiracies to conceal facts with the purpose of preventing detection, conviction and punishment. However, as Judge Oakes pointed out in *United States v. Colasurdo,* 453 *F.2d* 535, 593 (2nd Cir. 1971), the United States Supreme Court objected only to the artificial extension of the life of a conspiracy by evidence of concealment after the criminal objectives of the conspiracy had been accomplished. The Court of Appeals believed that such

> acts of covering up, though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. 453 *F.2d* at 592.

Nevertheless, in *Ingram v. United States,* 360 *U.S.*672, 679 n.10, 79 *S.Ct.*1314, 1319, 3 *L.Ed. 2d* 1503 (1959), the Supreme Court held that direct evidence of acts of concealment was admissible to prove a continuing conspiracy in which concealment was not only essential to the success of the scheme but was the very heart and object. The State submits that the factual situation in the instant case is closer to the doctrine and determination articulated in *Ingram* rather than *Krulewitch.* First, *Krulewitch* is inapposite since it dealt more fully with attempted prosecutorial exploitation of the "mutually understood need for secrecy" which is always part of a conspiracy in its concealment phase rather than an independent, affirmative effort to obstruct justice

by searching illegally for grounds to overturn a verdict. Second the hazards anticipated in *Krulewitch*, relating to the creation of a judge-made rather than statutory federal offense and the admissibility of hearsay declarations of a co-conspirator, are not present in the instant case. Finally, within the context of applicable New Jersey law, it would be possible for Judge Johnson to find an express continuing conspiracy constructed in order to destroy the verdicts rendered at trial.

Since the conspiracy was continuing at the time that the jurors were improperly interviewed, petitioner should be barred from using the evidence found in these interviews.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certioari should be denied.

Respectfully submitted,

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